

MEMORANDUM OF UNDERSTANDING

**National Environmental Policy Act and
Section 404 Clean Water Act
Integration Process for
Surface Transportation Projects in California**

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I. Background

In a May 1, 1992 agreement, the U.S. Department of Transportation, the U.S. Army Corps of Engineers (COE), and the U.S. Environmental Protection Agency (EPA) adopted as agency policy (1) improved interagency coordination and (2) integration of NEPA and the Clean Water Act Section 404 procedures. In March, 1994, a Memorandum of Understanding (MOU) was executed to implement this policy at the regional level.¹ Signatories to this MOU were the COE, South Pacific Division; EPA, Region IX; the Federal Highway Administration (FHWA), Region 9; the Federal Transit Administration (FTA), Region 9; the U.S. Fish and Wildlife Service (FWS), Regions 1 and 2; the National Marine Fisheries Service (NMFS), Southwest Region; the Arizona Department of Transportation; the California Department of Transportation (Caltrans); and the Nevada Department of Transportation (NDOT).

On August 21, 2000, representatives from EPA, FHWA, FTA, NDOT, FWS, NMFS, COE and Caltrans participated in a meeting to discuss the future of the 1994 MOU. This meeting was precipitated by the following events which affected the 1994 MOU's scope and applicability, and which led the signatory agencies to consider its revision:

- **FHWA Organizational Change.** In fiscal year 1999, the FHWA reorganized, eliminating the regional level of organization. California, Nevada and Arizona are now independent Divisions, which are not linked as a region and which therefore may act independently to execute agreements with other agencies. Because California has a much larger transportation program as well as more projects with potential effects on wetlands, both Caltrans and FHWA requested that the MOU be revised to limit application to federal-aid transportation projects in California.
- **Nationwide Permit Changes.** The COE issued new Nationwide Permits (NWP) and General Conditions on March 9, 2000. These changes substantially reduced the impact threshold for an Individual Permit. Because the 1994 MOU stipulated that the NEPA/404 Integration Process was applicable to projects requiring an Individual Permit, the effect of the regulatory change was a significant increase in

¹ *Memorandum of Understanding, National Environmental Policy Act and Clean Water Act Section 404 Integration Process for Surface Transportation Projects in Arizona, California, and Nevada* (March 1994).

the number of projects subject to the integration process. Agency representatives agreed that the integration process should not be so dependent on COE permit thresholds, so that the MOU would not need revision with each change in COE permit requirements.

- **Environmental Streamlining National MOU.** Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21) calls for a coordinated environmental review process to expedite Federal highway and transit projects. To that end, an *Environmental Streamlining National Memorandum of Understanding* was executed in July, 1999 by the U.S. DOT, the COE, the U.S. Department of Interior; EPA; the U.S. Department of Commerce; the Advisory Council on Historic Preservation; and the U.S. Department of Agriculture. This National MOU affirms these agencies' commitment to streamlining environmental review processes. Revision and improvement of the original 1994 NEPA/404 MOU was viewed by several of the signatory agencies to the 1994 MOU as one way to implement this national policy at the local level.

Although some agencies expressed concern about developing a California-only MOU, the consensus at the August 2000 meeting was to revise the 1994 MOU. This, the revised MOU, was drafted by a group representing all of the original signatory agencies, except for the Arizona and Nevada Departments of Transportation, and the Arizona and Nevada Divisions of FHWA. This MOU is intended to continue implementation of the national policy outlined in the May, 1992 agreement, and to further the goals of environmental protection and environmental review process streamlining articulated in the 1999 *Environmental Streamlining National Memorandum of Understanding*.

II. Purpose and Goals

The purpose of the integration process is to contribute to sound, timely project and permit decisions based on a NEPA document that complies with Clean Water Act (CWA) Section 404(b)(1) Guidelines². The goals of the integration process are:

- To improve cooperation and efficiency of governmental operations at all levels, thereby better serving the public.
- To expedite construction of necessary transportation projects, with benefits to mobility and the economy at large.
- To protect and enhance the waters of the U.S., which will benefit the region's aquatic ecosystems and the public interest.

III. Commitment to NEPA/404 Integration

- A. We, as signatories to this MOU, are committed to integrating the requirements of NEPA and Section 404 of the Clean Water Act for transportation projects. We are committed to ensuring the earliest possible consideration of environmental concerns in the planning, programming, and project development stages by improving

² 40 CFR 230.

interagency cooperation and consultation at all levels of government. We recognize that decisions made prior to the NEPA process, during transportation planning and programming, are key to successful integration of NEPA and Section 404 requirements, and are committed to providing information and input during these early stages in order to further the purpose and goals of this MOU.

- B. To satisfy these commitments, we agree to implement the *NEPA/404 Integration Process for Surface Transportation Projects in California* (Integration Process), as described in this MOU and illustrated in the attached flow diagram ([Attachment A](#)), which is incorporated herein by reference. This process begins with the pre-NEPA activities of transportation planning and programming, continues through the NEPA/project development process, and ends with the COE permit decision. As described herein, the Integration Process does not include all environmental review and permitting requirements, including, but not limited to, Endangered Species Act (ESA) compliance, Section 401 of the Clean Water Act certification, Coastal Zone Consistency, and Section 106 compliance. We are committed to ensuring that these other permit and approval requirements are integrated into the overall NEPA process.
- C. Regulatory/resource agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the participating agencies.

IV. Supplemental Guidance on Integration Process

In the interest of clarity, we have included only the key elements of the Integration Process in the body of this MOU and in the flow diagram. However, we recognize that participants will need more detailed guidance in order to implement the Integration Process. To that end, the signatory agencies have developed and will jointly maintain a *Guidance Paper*³ that provides detailed instructions and recommendations for implementation of the Integration Process, as follows:

- A. At a minimum, this Guidance Paper will identify the roles and responsibilities of each agency at each stage in the Integration Process; establish information requirements for each of the Checkpoint decisions and its associated submittals; establish maximum review and response times for each Checkpoint and its associated submittals; and establish documentation requirements for each decision and Checkpoint in the Integration Process.
- B. The Guidance Paper will be distributed to all staff of the signatory agencies who may be involved in the Integration Process.
- C. In the event of a conflict between this MOU and the Guidance Paper, the requirements of this MOU shall take precedence.
- D. With mutual agreement, the signatory agencies may revise the Guidance Paper as necessary in order to clarify procedures and/or respond to changing requirements or

³ *Guidance Paper: Implementation of The National Environmental Policy Act and Section 404 Clean Water Act Integration Process for Surface Transportation Projects in California.*

regulations. The process outlined in Article VIII (Monitoring and Evaluation of MOU Implementation) will be used when revising the Guidance Paper.

- E. Guidance Paper revisions will not necessitate revision of this MOU unless those revisions would create a conflict between the MOU and the Guidance Paper.

V. Pre-NEPA Activities: Project Planning and Programming

Although transportation planning and programming occur prior to the NEPA process, the signatories to this MOU endorse the early identification and consideration of environmental concerns in conjunction with land use and transportation planning. Such early consideration will facilitate the NEPA/404 Integration Process, and will lead to better transportation projects and decisions. Therefore, we commit to the following actions to encourage and assist Metropolitan Planning Organizations (MPOs) to address environmental issues early in the planning process.

A. Caltrans agrees to:

1. Review and comment on the adequacy of information and avoidance of sensitive resources presented in the Regional Transportation Plans (RTPs) and associated environmental analyses.
2. Request MPOs to provide RTPs and associated environmental analyses to federal regulatory/resource agencies for review and comment.
3. Encourage all MPOs to incorporate the principles of the Section 404(b)(1) Guidelines into development of RTPs.
4. Provide existing environmental resource data to MPOs for the development of inventories of waters of the U.S. and associated sensitive species.
5. For Caltrans-sponsored projects, provide the environmental information resulting from the programming process to the MPOs for inclusion in the cumulative impact assessment of the RTP.
6. For Caltrans-sponsored projects, include the costs of avoiding, minimizing, and compensating for impacts to waters of the U.S. and sensitive species in the project cost of the alternatives evaluated.
7. Encourage all other project sponsors to:
 - a. supplement documents if necessary before sending them for review to regulatory/resource agencies;
 - b. include the costs of avoiding, minimizing, and compensating for impacts to waters of the U.S. and sensitive species in the project cost of the alternatives evaluated; and
 - c. provide the environmental information resulting from the programming process to the MPOs for inclusion in the cumulative impact assessment of the RTP.

B. FHWA and FTA agree to:

1. Provide copies of this MOU to all MPOs and advise them that adherence to this MOU would be appropriate in consideration of the environmental planning factors listed in the planning provisions of 23 USC section 134.
2. Assure that the signatory agencies of this MOU are invited to provide public comments during the triennial Federal planning certification for each major MPO, and invite the signatory agencies to assist in evaluating the MPOs' consideration of environmental factors, as part of the triennial Federal planning certification.
3. Invite the signatory agencies of this MOU to participate in the annual Intermodal Planning Group (IPG) meeting where they can discuss environmental/planning issues, as well as to meetings with MPOs related to Overall Work Plan (OWP) activities.

C. The COE, EPA, FWS, and NMFS agree to:

1. Provide input to MPOs during the development and adoption of the RTP, particularly on the issues of: purpose and need, alternative selection, mode, and environmental impacts, including cumulative impacts.
2. Review environmental elements of programming documents as requested by FHWA/FTA and/or Caltrans.
3. Subject to staff availability, assist in development and delivery of training on COE permit procedures and requirements, including the section 404(b)(1) guidelines.
4. Provide information to Caltrans and MPOs related to ongoing activities that may have bearing on transportation and land use decisions, such as critical habitat designations, species recovery plans, or special area management plans.

VI. NEPA/404 Integration: Project Development

A. Applicability

1. The NEPA/404 Integration Process for Project Development applies to all projects needing Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) action under the National Environmental Policy Act (NEPA), *and that*:
 - a. Require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) *and* will require an Individual Permit under Section 404 of the Clean Water Act; *or*
 - b. Require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) and will qualify for a Nationwide Permit under Section 404 of the Clean Water Act, but will have 1.5 acres or greater impact on waters of the U.S.
2. If a proposed project meets the criteria above, use of the *Integration Process* for project development is mandatory through Checkpoint #1, as described below.

This requirement for Checkpoint #1 review applies to *all* projects that meet the threshold, regardless of their stage in the project development process.

3. Normally, the Checkpoint #1 decision on whether to continue with the *Integration Process* will be made before formal initiation of the NEPA process (e.g., before the NOI for an EIS, or initiation of environmental studies for an EA). For projects undergoing Checkpoint #1 review at later stages of project development, the signatory agencies will consider the appropriateness, feasibility and practicality of initiating the *Integration Process* at that stage. If a decision is made to continue with the *Integration Process*, it shall be at that point in the Integration Process flow diagram that corresponds to the project's NEPA process at the time of the Checkpoint #1 decision.
4. The *Integration Process* may also be applied to projects that do not satisfy the criteria in item 1, above, if the participating agencies determine the *Integration Process* is warranted.

B. Integration Process Summary

The following is a summary of the key milestones and decision points of the *Integration Process* for project development. It does not include all of the steps, activities and products identified in the flow diagram ([Attachment A](#)) or the Guidance Paper.

1. Checkpoint #1: Signatory Agency Decision on Integration Process

The objective of Checkpoint #1 is to reach consensus among Signatory Agencies on which projects will proceed through the Integration Process, and which projects will be screened out and will not continue the process. This screening decision will be made based on information about the proposed project's scope and potential impacts that is provided by the project sponsor to the participating agencies.

- a. All projects that meet the applicability criteria outlined above will proceed through Checkpoint #1 of the Integration Process. Those that are screened out at Checkpoint #1 will not proceed through the subsequent checkpoints.
- b. Checkpoint #1 decisions will be made at regularly scheduled meetings of the signatory agencies. The agencies will establish an annual schedule of meetings for each COE District (Los Angeles, Sacramento, San Francisco).
- c. The agencies will assure that representatives at Checkpoint #1 meetings are authorized to make decisions on applicability of the *Integration Process* to the specific projects under review.
- d. By mutual agreement, the agencies will establish procedures and protocols for Checkpoint #1 meetings that will include, but not be limited to responsibilities for notification; review and response times; level of information to be supplied to participating agencies; and documentation requirements.
- e. All signatory agencies agree to send a representative to every scheduled Checkpoint #1 meeting unless the agency gives prior notification that the

agency does not have significant concerns. If meeting attendance is not anticipated (no significant concerns) the signatory agency will forward a recommendation on whether the agency recommends moving forward with the integration process for each project presented.

- f. If participating agencies cannot reach consensus on the screening decision at Checkpoint #1, the federal lead agency (FHWA or FTA) for the proposed project will make the determination.

2. Checkpoint #2: Project Need and Purpose; Project Alternatives

The purpose of Checkpoint #2 is to afford Signatory Agencies an early consultation opportunity regarding the Project Need and Purpose Statement and the range of alternatives to be addressed in the NEPA document. The goal of the Checkpoint #2 consultation is to obtain written agreement on the Need and Purpose Statement for the project and subsequently on the alternatives to be addressed in the project's draft NEPA document and evaluated by COE and EPA under the CWA Section 404(b)(1) Guidelines.

- a. Checkpoint #2 represents a significant milestone in an ongoing process of consultation and coordination among the agencies participating in the *Integration Process* for a specific project.
- b. Agencies participating in the Integration Process for a specific project will decide if there is a need for a formal meeting to reach Checkpoint #2 decisions, or if an alternative approach would be appropriate.
- c. The conclusion of Checkpoint #2 is a written letter of Agreement or Dissent by each agency on the project's Need and Purpose and the Alternatives to be addressed in the draft NEPA document. If participating agency fails to provide a written response within agreed-upon timeframes, the *Integration Process* may proceed to Checkpoint #3 without the written documentation.

3. Checkpoint #3: Preliminary LEDPA Determination and Conceptual Mitigation

The purpose of Checkpoint #3 is to afford opportunities for participating agencies to discuss public and agency comments on the DEIS/EA and the preliminary COE Public Notice, as well as Caltrans/FHWA/FTA's proposed responses to comments concerning the LEDPA (Least Environmentally Damaging Practicable Alternative). The objective of Checkpoint #3 is to reach an agreement on the preliminary LEDPA and conceptual mitigation.

- a. Checkpoint #3 represents a significant milestone in an ongoing process of consultation, coordination and information sharing among the participating agencies.
- b. The Checkpoint #3 analysis will focus only on the factors used by the COE in making the LEDPA decision.
- c. The conclusion of Checkpoint #3 is a written letter of Agreement or Dissent by each agency on the preliminary LEDPA and conceptual mitigation for the proposed project. If a participating agency fails to provide a written

response within agreed-upon timeframes, the project proponent and other signatory agencies may move forward with the *Integration Process* based on the presumption that the non-response means that the agency has no significant objections to the preliminary LEDPA and conceptual mitigation to be discussed in the NEPA document.

4. Completion of Integration Process

- a. Following completion of Checkpoint #3, Caltrans/FHWA/FTA will prepare the final NEPA document (FEIS or EA/FONSI), following normal NEPA procedures.
- b. The final NEPA document will identify the LEDPA as the preferred alternative.
- c. As concurrently as practical with publication of the final NEPA document, Caltrans/FHWA/FTA will submit a final application for the Section 404 permit, along with a Mitigation Plan, to the COE. The COE will publish its public notice for the proposed 404 Permit as concurrently as practical with the Caltrans/FHWA/FTA Notice of Availability of the FEIS or preparation of the EA/FONSI.
- d. Following availability of the final NEPA document, Caltrans/FHWA/FTA will conclude the NEPA process in accordance with agency regulations procedures.
- e. Following completion of the NEPA process, any necessary revisions to the COE application, and submittal of the final mitigation plan, the COE will determine if the project is in compliance with the CWA Section 404(b)(1) Guidelines, and will make a public interest decision on issuance of the permit. The COE shall complete the decision document.

C. Participation

1. It is understood that the roles of FWS and NMFS in this Integration Process are limited to their NEPA and Section 404 responsibilities and authorities. Any agreements provided in the course of the Integration Process do not confer or imply compliance with the Endangered Species Act.
2. If COE, EPA, FWS, and/or NMFS choose not to participate in the *Integration Process*, they will notify the project sponsors in writing, who may proceed to the next stage (or next phase of project development) without prejudice. However, nonparticipation implies that, based upon information provided by the project sponsors, it appears that regulatory and resource issues are of a magnitude amenable to resolution at the next stage.
3. Participating agencies will make every effort to ensure continuity of staff representation on a project, as well as participation in meetings and decisions at the appropriate level within their respective agency.

D. Agency Commitments

1. Caltrans agrees to request regulatory/resource agency involvement early in the NEPA process.
2. COE, EPA, FWS, and NMFS agree to participate in project development process when there are substantial impacts to resources under their jurisdiction.
3. We all agree to provide information and respond to requests within established time frames.

E. Agreement/Dissent

1. Whether they agree or not, agencies will provide their comments in a timely manner, as defined for each stage by mutual agreement of the participating agencies.
2. Agencies agree not to revisit previous agreements or *Integration Process* Checkpoints unless there is significant new information or significant changes to the project, the environment, or laws and regulations.
3. Agencies agree to provide an explanation of the basis for dissent. All agencies (transportation and regulatory/resource) agree to attempt to resolve issues causing the lack of agreement.

VII. Dispute Resolution

We are committed to expeditiously resolving disagreements between signatory agencies and/or project sponsors. Disputes may relate to the Integration Process for a specific project, or to programmatic issues regarding the implementation of this MOU and the Integration Process.

A. Project-Specific Disputes

1. Project-specific disputes may include, but aren't limited to: dissent at a Checkpoint; disputes about the level of information required for an agency to complete an evaluation at a Checkpoint; or failure of an agency to respond within agreed-upon timeframes. Even though participating agencies may continue the *Integration Process* if one agency fails to provide a written response or does not agree with decisions made at a Checkpoint, there may be situations where one or more of the participating agencies wishes to resolve a dispute.
2. Disputes will be resolved at the lowest possible level, using a "dispute resolution ladder" approach. If a dispute cannot be resolved at one level, it will be promptly elevated to the next level, until the dispute is resolved or the participating agencies agree to terminate the resolution process.
3. At the beginning of the Integration Process for a specific project, the participating agencies will adopt a resolution process to be used for that project. At a minimum, the process will include:
 - a. Identification, by name and title, of each agency's hierarchy for dispute resolution on that project.

- b. Notification procedures to be used to initiate the dispute resolution process.
 - c. Applicable timeframes for resolution at each level, before elevating the dispute to the next level.
 - 4. Any participant in the Integration Process for a project may invoke the dispute resolution process.
- B. Programmatic Disputes
- 1. Programmatic disputes may include, but aren't limited to disagreements about interpretation of the terms of this MOU or the requirements of the *Integration Process*. Any dispute that is not project-specific is considered programmatic.
 - 2. Programmatic disputes will be brought to the attention of the designated agency representatives who are charged with monitoring and evaluation of MOU implementation, as described below. Programmatic disputes will be resolved following a participative process to be established by the representatives.

VIII. Monitoring and Evaluation of MOU Implementation

The signatory agencies will monitor the success of the *Integration Process* and recommend modifications to the Integration Process and/or the Guidance Paper as necessary for improvement. We commit to the following responsibilities and tasks to help ensure the success of this MOU and the *Integration Process*:

- A. Monitoring and Evaluation Representatives
- 1. Each signatory agency will designate a representative to serve as its primary point of contact for MOU implementation, monitoring and evaluation. FHWA will take the lead for monitoring and evaluation activities, such as scheduling meetings and distributing information to the representatives.
 - 2. The designated agency representatives will meet at least annually to evaluate MOU implementation, assess the need for MOU and/or Guidance Paper modification, and to identify additional opportunities for streamlining the *Integration Process*.
- B. Continuous Improvement
- 1. All signatory agencies will ensure that staff participating in the Integration Process are trained in the process.
 - 2. MOU and Integration Process evaluation will be included on the agenda for each Checkpoint #1 meeting.
 - 3. All signatory agencies will maintain project-specific records of Integration Process involvement.
- C. Revisions and Resolution of Programmatic Disputes
- 1. The designated agency representatives shall define a formal, participative process for recommending revisions to the Guidance Paper or MOU.

2. The representatives also shall define the process to be used for resolving programmatic disputes. This process shall use a dispute resolution ladder approach.
3. Guidance Paper or MOU revisions may be proposed by any signatory agency, through its designated representative.
4. Revisions to the Guidance Paper must be agreed to by the signatory agencies, but will not necessitate MOU revision unless the revision would create a conflict between the MOU and the Guidance Paper.
5. All signatory agencies have a responsibility to inform their designated representatives as soon as a concern about MOU implementation is identified.

IX. MOU Modification, Amendment or Termination

- A. This MOU will become effective upon execution and shall remain in effect until it is amended or terminated in accordance with this Article.
- B. Modification to this MOU may be proposed by one or more signatories. Proposals for modification will be circulated to all signatories for a 30-day period of review. Upon written acceptance of a proposal by all signatories, a revised MOU or an amendment thereto will be circulated for execution.
- C. Any signatory may terminate participation in this agreement upon written notice to all other signatories.
- D. Attachments and Appendices to this MOU may be modified upon written approval of all signatories. Revisions to Attachments or Appendices will not necessitate formal modification of the MOU itself unless the revision is in conflict with the MOU.

X. Signatures